APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBYN ASTAIRE,
Plaintiff-Appellee,
v.
BEST FILM & VIDEO CORP.
Defendant-Appellant.

No. 95-56632
D.C. No.
CV-90-00261-KN

ROBYN ASTAIRE,
Plaintiff-Appellant,
v.
BEST-FILM & VIDEO CORP.
Defendant-Appellee.

No. 95-56633
D.C. No.
CV-90-00261-KN
OPINION

Appeals from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding.

Argued and Submitted
March 3,1997 — Pasadena, California

Filed June 20, 1997

Before: Mary M. Schroeder, Charles E. Wiggins and
Edward Leavy, Circuit Judges.

Opinion by Judge Wiggins, Dissent by Judge Schroeder

SUMMARY

Intellectual Property/Entertainment

The court of appeals reversed a judgment of the district court. The court held that under California law, a videotape manufacturer may use clips from a deceased entertainer's movies for internal advertising of instructional videotapes under a state statutory exemption for such use in "film."

In 1965, Fred Astaire granted the Ronby Corporation an exclusive license to use his name and likeness in connection with the operation of dance studios, schools, and related activities. Appellee Best Film and Video Corporation agreed with Ronby to produce instructional videotapes using the Astaire name and licenses.

The videos were known as the "Fred Astaire Dance Series." The packaging emphasized their connection with Astaire. Each video contained short film clips from two of Astaire's films in which he is shown dancing.

When Astaire died in 1987, his wife Robyn succeeded to all rights in his name, voice, likeness, and persona under California Civil Code § 990. Section 990(a) provides a cause of action for the owner of such rights who is injured as a result of their unauthorized use "on or in products, merchandise, or goods," or for the purpose of "advertising, or selling, or soliciting" their purchase. Exempted by subsection (n)(1) are use in a film or television program, and by subsection (n)(4), use in an advertisement or commercial announcement for such permitted uses. Best did not have Robyn's authorization to use the Astaire film clips in its videotapes.

Robyn sued Best, alleging that its videotapes violated her rights under § 990. The district court determined that Best's use of the film clips was covered by § 990(a); that is was not a use for "advertising, selling or soliciting"; that it was not exempt under subsection (n); that Robyn's claim was not

preempted by federal copyright law; and that Best's use was not protected by the First Amendment. Both sides appealed.

[1] Although subsection (n)(1) exempts films and television programs. it does not mention videotapes. Language of a statute should not be given a literal meaning if doing so would result in absurd consequences the legislature did not intend. **[2]** Interpreting subsection (n)(1) to exempt a film or television program but not a videotape would create an absurd result: a motion picture is exempt when it is shown in a theater or on cable television, but not when someone rents it at a video store and plays it on his VCR. A narrow construction of "film" and "television program" would be inconsistent with subsection (i), which defines "photograph" broadly to include videotape or live television transmission. It would be anomalous if the definition of photograph included a videotape recording of a film, but "film" did not. The term "film" in subsection (n)(1) encompassed Best's videotapes.

[3] Uses listed in subsection (n)(1) are not exempt if they are advertisements or commercial announcements not exempt under subsection (n)(4). Best's use of the Astaire film clips was exempt in either case. **[4]** If it was not an advertisement or a commercial announcement, Best's use was exempt pursuant to subsection (n)(1). If the film clips were advertisements, they were advertisements for the videotapes themselves rather than some other product. Because Best's videotapes were among the uses exempted by subsection (n)(1), subsection (n)(4) provided that even if Best's use of the film clips was an advertisement or commercial announcement, such use was exempt from liability. **[5]** The only plausible reading of subsection (n)(4) is that it exempts advertisements and commercial announcements for uses permitted by the previous subsections.

[6] The evolution of subsection (n) demonstrated that the interpretation of the statute the court of appeals con-

cluded was required by the plain language was consistent with the Legislature's intent. **[7]** Whether the use is intended to increase the marketability of a product cannot be the test for whether it is exempt from § 990 liability. **[8]** Best's use of the Astaire film clips was exempt.

Judge Schroeder dissented, writing that California Civil Code § 990(n)(4) exempts only advertisements or commercial announcements for uses permitted in the preceding paragraphs.

COUNSEL

William E. Wegner, Gibson, Dunn & Crutcher, Los Angeles, California, for the plaintiff-appellee-cross-appellant.

George R. Hedges, Hedges & Caldwell, Los Angeles, California, for the defendant-appellant-cross-appellee.

Angela S. Alberts, Theodore J. Minch and Christine M. Sovich, Indianapolis, Indiana, in house counsel for the amicus CMG Worldwide, Inc.

Robert C. Vanderet, Neill S. Jass, O'Melveny & Myers, Los Angeles, California, for the amici CBS Inc., Fox, Inc., National Broadcasting Company, Inc., and Warner Bros.

Dean T. Barnhard, Barnes & Thornberg, Indianapolis, Indiana, Shirley M. Hufstedler, Morrison & Foerster, Los Angeles, California, for the amici Wayne Enterprises Ltd., Wayne Productions, Inc., the Screen Actors Guild, Inc., et al.

OPINION

WIGGINS, Circuit Judge:

Best Film & Video Corporation ("Best") is a New York corporation which manufactures, markets, and distributes

pre-federal district court, alleging *inter alia* that the Best videotapes violated her § 990 rights by using Astaire's image as it appears in the clips from *Second Chorus* and *Royal Wedding* without her permission. Although Mrs. Astaire originally contended otherwise, the parties no longer dispute that Best's use of Astaire's name and the still photographs are authorized under Astaire's agreement with Ronby. Thus, this case focuses entirely on whether § 990 provides Mrs. Astaire with a claim against Best's use of the Astaire film clips.

After several years of proceedings, the district court entered a judgment which made the following legal determinations: (1) Best's use of the Astaire film clips was covered by § 990(a)'s "on or in products, merchandise, or goods" language; (2) Best's use of the Astaire film clips was not a use for "advertising, selling, or soliciting" in violation of § 990(a); (3) Best's use of the Astaire film clips was not exempt under § 990(n); (4) Mrs. Astaire's § 990 claim was not preempted by the federal Copyright Act; and (5) Best's use of Astaire's likeness was not protected by the First Amendment. Both sides appeal. We have jurisdiction under 28 U.S.C. § 1291.

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(1) A play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4).

(2) Material that is of political or newsworthy value.

(3) Single and original works of fine art.

(4) An advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3).

Cal. Civ. Code § 990 (West Supp. 1997).

DISCUSSION

I. *Standard of Review*

We review the district court's decision on an issue of state law under the same de novo standard applied to decisions of recorded videotapes. Robyn Astaire ("Mrs. Astaire") is the widow of the legendary performer Fred Astaire. Mrs. Astaire sued Best in federal district court, alleging that Best's use of her late husband's image in a series of dance instructional videotapes violated her statutory right to control such use under California law. Although the district court concluded that Astaire's image was not used for the purpose of advertising, selling, or soliciting the purchase of the videotapes, the district court granted summary judgment in favor of Mrs. Astaire. Both sides appeal. Concluding that Best's use of Astaire's image is exempt from liability pursuant to Cal. Civ. Code § 990(n), we reverse.

BACKGROUND

In 1965, Fred Astaire granted the Ronby Corporation ("Ronby") an exclusive license to use his name in connection with the operation of dance studios, schools, and related activities. Astaire also granted Ronby the right to use certain pictures, photographs, and other likenesses of himself as had been used under a previous agreement, as well as any new photographs and likenesses that he approved in writing.

Twenty-four years later, Best entered into an agreement with Ronby to produce a series of dance instructional videotapes using the Fred Astaire Dance Studios name and licenses. Since October 1989, Best has been manufacturing and distributing a series of five videotapes known as the "Fred Astaire Dance Series." The videotapes are each about thirty minutes long and provide instruction in a type of dancing, with titles such as "Swing," "Latin Dancing," and "Ballroom."

Each videotape is packaged in a box prominently labelled "Fred Astaire Franchised Dance Studios" on every side. The back of the box features the following quote attributed to Astaire: "Some people feel that good dancers are born. All the good dancers I've known have been taught or trained." The back also contains a description of the videotape that refers to Astaire as "the master" and "the world's greatest dancer."

The videotape itself begins with an introductory segment. After Best's logo is shown, the title "Fred Astaire Dance Studios Presents How to Dance Series" appears on the screen. Then, before any other footage or narration, the videotape contains about ninety seconds of footage from two of Astaire's films — *Second Chorus* and *Royal Wedding* — in which Astaire is shown dancing alone and with a partner ("the Astaire film clips"). Some still photographs of Astaire follow, and then a narrator appears on a stage adorned with more Astaire photographs. The narrator then introduces the series and the instructional portion of the video.

Fred Astaire died in 1987. He was survived by his wife, Robyn, who has succeeded to all rights in his name, voice, signature, photograph, likeness and persona under Cal. Civ. Code § 990.[1] In 1989, Mrs. Astaire sued Best and others in

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[1] Section 990 provides, in relevant part:

(a) Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for the purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof . . . .

(h) As used in this section, "deceased personality" means any natural persons whose name, voice, signature, photographs, or likeness has commercial value at the time of his or her death . . . .

(i) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any video tape or live

federal law. *Mastro v. Witt,* 39 F.3d 238, 241 (9th Cir. 1994). For questions of California law, we must apply the law as we believe the California Supreme Court would apply it. *Intel Corp. v. Hartford Accident & Indem. Co.,* 952 F.2d 1551, 1556 (9th Cir. 1991). In the absence of a California Supreme Court decision, we must predict how the California Supreme Court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises and restatements as guidance. *Lewis v. Telephone Employees Credit Union,* 87 F.3d 1537, 1545 (9th Cir. 1996).

II. *Section 990*

Many of the parties' arguments focus on § 990. Best argues that the district court erred when it concluded that its use of the Astaire film clips violated the "on or in products, merchandise, or goods" prong of the statute. Best also contends that the district court erred when it concluded that its use of the Astaire film clips was not exempt under subsection (n). Mrs. Astaire argues that the district court erred when it concluded that Best's use of the Astaire film clips did not violate the "advertising, selling, or soliciting" prong of subsection (a). We first address Best's subsection (n) argument, because if Best's use is exempt from § 990 liability altogether, we need not reach the other issues presented by this case.

We begin by reviewing California law on statutory interpretation. The California Supreme Court recently stated that "[the] first task in construing a statute is to ascertain the intent of the legislature so as to effectuate the purpose of

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television transmission, of any person, such that the deceased personality is readily identifiable . . . .

(n) This section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, in any of the following instances:

the law." *Quintano v. Mercury Cas. Co.*, 906 P.2d 1057, 1060 (Cal. 1995). This process of apprehending the legislature's intent sensibly starts with the statute's language:

> In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. . . . The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.

Dyna-Med, Inc. v. Fair Employment & Housing Comm'n., 743 P.2d 1323, 1326 (Cal. 1987).

With these principles in mind, we turn to the language of the statute. Section 990(n) provides:

> (n) This section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, in any of the following instances:
>
> (1) A play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4).
>
> (2) Material that is of political or newsworthy value.
>
> (3) Single and original works of fine art.
>
> (4) An advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3).

Cal. Civ. Code § 990(n).

Giving this language its ordinary and usual meaning, this provision tells us that the following uses are exempt from § 990 liability: use in a play, book, magazine, newspaper, musical composition, film, radio or television program; use in material that is of political or newsworthy value; use in single and original works of fine art; and use in an advertisement or commercial announcement for any of the aforementioned uses. However, subsection (n)(1) limits the exemption for use in a play, book, magazine, newspaper, musical composition, film, radio or television program: such uses are not exempt if they are advertisements or commercial announcements. However, that limitation is also limited: such advertisements or commercial announcements may still be exempt under subsection (n)(4), the provision which exempts advertisements and commercial announcements for the uses described in subsections (n)(1), (n)(2), and (n)(3). Thus, to determine whether a use is exempt under subsection (n)(1) requires reference to subsection (n)(4), which in turn refers back to subsections (n)(1), (n)(2). and (n)(3).

Given this fairly convoluted statutory scheme, a few examples help us determine what these provisions mean:

Example 1. Suppose someone writes a magazine article about the history of television that uses a deceased personality's name without authorization. Neither the writer nor the magazine publisher could be sued under § 990: the writer's use of the deceased personality's name would be exempt from § 990 liability pursuant to subsection (n)(1).

Example 2. Suppose that an automobile manufacturer wanted to advertise its latest model in the same magazine with a splashy color layout that included the picture of a deceased personality. Although the use appears in a magazine, the use of the deceased personality's photograph would not be exempt under subsection (n)(1) because it appears in an advertisement. The use is not permitted in subsections

(n)(1), (n)(2), or (n)(3), so it is not exempt under subsection (n)(4).

Example 3. Suppose that the magazine publisher from Example I wanted to advertise its magazine by referring to various articles that had appeared within its pages, including the article about the history of cinema. If that advertisement used the deceased personality's name, that use would be exempt under subsection (n)(4), because the advertisement was for a magazine, a use permitted by subsection (n)(1).

[1] With these examples in mind, we turn to Best's use of the Astaire film clips. Best's use of the Astaire film clips appears on a pre-recorded videotape. Although subsection (n)(1) exempts films and television programs, it does not mention videotapes. Ordinarily, if the language of the statute is clear and unambiguous, there is no need to resort to the indicia of the intent of the legislature. *Lungren v. Deukmejian,* 755 P.2d 299, 303-04 (Cal. 1988). However, this "plain meaning" rule "does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose." *Id. at 304. "It is a settled rule of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." Younger v. Superior Court*, 577 P.2d 1014, 1021-22 (Cal. 1978). "The intent prevails over the letter, and the letter will, if possible, be so read so to conform to the spirit of the act." *Lungren*, 755 P.2d at 304.

[2] Interpreting subsection (n)(1) to exempt a film or television program but not a videotape creates an absurd result: a motion picture is exempt from § 990 liability when it is shown in a theater or on cable television but not when someone rents it at a video store and plays it on his VCR. Moreover, a narrow construction of "film" and "television program" would be inconsistent with § 990(i), which defines "photograph" broadly to include "any photographic

reproduction, still or moving, of any video tape or live television transmission . . . such that the deceased personality is readily identifiable." It would be anomalous if the definition of photograph included a videotape recording of a film but "film" did not. Consequently, we conclude that the California Supreme Court would not adhere to the literal language of subsection (n)(1); rather, we conclude that the term "film" in subsection (n)(1) encompasses Best's prerecorded videotapes.

[3] However, our inquiry is not yet complete. As Example 2 illustrates, a use is not automatically exempt because it is listed in the first part of subsection (n)(1). The uses listed in the first part of subsection (n)(1) are not exempt if they are "advertisement[s] or commercial announcement[s] not exempt under [subsection] (n)(4)." The parties dispute whether Best's use of the Astaire film clips is an advertisement or commercial announcement. We need not resolve this dispute, however, because Best's use of the Astaire film clips is exempt from liability in either case.

[4] If Best's use of the Astaire film clips is not an advertisement or commercial announcement, then the second part of subsection (n)(1) does not apply. Accordingly, Best's use is exempt from liability pursuant to subsection (n)(1). If, however, we assume for argument's sake that Best's use of the Astaire film clips is an advertisement or commercial announcement, Best's use is still exempt from liability. If the Astaire film clips are an advertisement, they are certainly an advertisement for the videotapes themselves rather than some other product. As Example 3 illustrates, subsection (n)(4) exempts advertisements and commercial announcements for uses permitted in subsections (n)(1), (n)(2), and (n)(3). Because Best's videotapes are among the uses exempted by the first part of subsection (n)(1), subsection (n)(4) provides that even if Best's use of the

Astaire film clips is an advertisement or commercial announcement, such a use is exempt from liability.

[5] Mrs. Astaire argues that even if videotapes are covered by the first part of subsection (n)(1), Best's use of the Astaire film clips is not exempt because such a use is an advertisement or commercial announcement. Mrs. Astaire's argument, however, ignores the last five words of subsection (n)(1), which refer to subsection (n)(4). We are not free to ignore this language, because we must attempt to give each part of the statute significance. The only plausible reading of subsection (n)(4) is that it exempts advertisements and commercial announcements for the uses permitted by the preceding three subsections.

In sum, we conclude that when subsection (n) is read in its entirety, the only interpretation of its plain language which is internally consistent and gives effect to each phrase and clause of the provisions leads to the conclusion that Best's use of the Astaire film clips is exempt. Rather than end the inquiry here, however, under California law we must determine whether the meaning of the plain language comports with the legislature's purpose.

Mrs. Astaire asserts that the legislative history of Senate Bill 613 ("SB 613"), the legislation which enacted § 990 in 1984, supports the district court's conclusion that subsection (n)(1) creates a limited exception for "legitimate historical, fictional, and biographical accounts of deceased celebrities." Mrs. Astaire asserts that because the Astaire film clips were included in Best's videotapes to make them more attractive and salable, the exemption of subsection (n)(1) does not apply.

To support her argument that the Legislature intended subsection (n)(1)'s exemption to be limited to legitimate historical, biographical, and fictional works, Mrs. Astaire principally relies on several letters written by the author of

SB 613. No matter how illuminating we might find these letters, California law generally prevents us from "consider[ing] the motives or understandings of an individual legislator even if he or she authored the statute." *Williams v. Garcetti*, 853 P.2d 507, 510 (Cal. 1993) (quoting *Delaney v. Superior Court*, 789 P.2d 734, 743 n-12 (Cal. 1990)). As a result, we may not consider the various letters written by the author of SB 613.

We may consider, however, "the history of the statute, committee reports, and staff bill reports . . . to determine the intent of the Legislature." *DeCastro West Chodorow & Burns, Inc. v. Superior Court*, 54 Cal. Rptr. 2d 792, 798 (Cal. Ct. App. 1996). We may also consider the evolution of a proposed statute after its original introduction in the California State Senate or Assembly, as such evolution may "offer considerable enlightenment as to legislative intent." *People v. Goodloe*, 44 Cal. Rptr. 2d 15, 19 (Cal. Ct. App. 1995).

As originally introduced, SB 613 did not contain § 990 at all, instead focusing on modifications to existing statutory provisions to create a right of publicity for the heirs and descendents of deceased personalities. After the bill was passed by the Senate, however, it was amended in the Assembly several times. On June 12, 1984, § 990(n) appeared for the first time in the amended legislation. It read:

> Nothing in this section shall be construed to derogate from any rights protected by constitutional guarantees of freedom of speech or freedom of the Press, such as the right to use a deceased personality's name, voice, signature, photograph, or likeness in a play, book, magazine, newspaper, film, television program, or similar medium of expression, to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press.

S.B. 613, 1983-84 Reg. Sess. (Cal. 1984) (hereinafter "S.B. 613") (as amended June 12, 1984).

A staff report on this version of SB 613 criticized this language for being superfluous: "[i]rrespective of this stated intent, a defendant who has used a person's name, voice, etc. without authorization may assert a First Amendment privilege." Staff of Assembly Comm. on Judiciary, 1983-84 Reg. Sess., *Report on S.B. 613 (Campbell) As Amended 6/12/84* at 6 (Cal. 1984). Shortly thereafter, § 990(n) was amended to its current version, which does not contain the language explicitly limiting the scope of its exemption to constitutionally protected uses. *See S.B. 613* (as amended July 3, 1984).

[6] The Legislature's removal of the language "to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press" from SB 613 is a telling clue as to the Legislature's intent. By deleting this language, the Legislature demonstrated an intent to adopt a broader exemption that was not limited to constitutionally protected uses. In other words, the evolution of subsection (n) demonstrates that the interpretation of the statute we conclude is required by the plain language is consistent with the Legislature's intent.

The same staff report on SB 613 describes the bill generally as follows:

> [T]he bill is intended to address circumstances in which (a) commercial gain is had through the exploitation of the name, voice, signature, photograph. or likeness of a celebrity of public figure in the marketing of goods or services or (b) a celebrity or public figure is subjected to abuse or ridicule in the form of a marketed product. Such goods or services typically involved the use of a *deceased* celebrity's name or likeness, e.g., on posters, T-shirts, porcelain plates, and other collectibles; in toys, gadgets, and other merchandise; in look-alike services.

Staff of Assembly Comm, on Judiciary, *supra*, at 3-4. Several other legislative staff reports describe the legislation similarly. *See. e.g.*, Assembly Office of Research, 1983-84 Reg. Sess., *Report on S.B. 613 (Campbell) As Amended 8/9/84* at 3 (Cal. 1984).

To the extent these reports reflect the Legislature's intent when it enacted § 990, our conclusion that Best's use of the Astaire film clips is exempt from liability is not inconsistent with this expressed intent. Best's use in no possible way subjects Fred Astaire to abuse or ridicule. Best's use is also nothing like the exploitative marketing uses described in these legislative staff reports.

[7] We recognize, however, that Best placed these film clips in its videotapes for a reason: to make the videotapes more salable. Nevertheless, neither the statute nor the legislative history provides any support for treating Best's use of the Astaire film clips any differently from the use of the same clips in a documentary about dance in film, a use that Mrs. Astaire concedes would be exempt from liability. In short, whether the use is included to increase the marketability of a product cannot be the test of whether it is exempt from § 990 liability.

[8] Having considered what limited guidance the legislative history of SB 613 gives us regarding the meaning of subsection (n), we conclude that the legislative history does not support Mrs. Astaire's contentions that the exception for use in a "play, book, magazine, newspaper, musical composition, film, radio or television program" is limited to "legitimate historical, fictional, and biographical accounts of deceased celebrities." We conclude that the language of subsection (n) should be given its ordinary and usual

meaning, and that Best's use of the Astaire film clips is accordingly exempt.[2]

CONCLUSION

We conclude that Best's use of the late Fred Astaire's likeness/photograph in its "How to Dance" videotapes is exempt from § 990 liability pursuant to subsection (n).[3] Accordingly, the judgment of the district court is reversed and we remand with instructions to enter judgment in favor of Best.

REVERSED and REMANDED.

SCHROEDER, Circuit Judge, Dissenting:

I dissent from the majority's conclusion that this use of Fred Astaire's legendary film performances, to preface a videotape having nothing to do with Fred Astaire, is exempt under the California statute. I dissent with respect, however, because the statute is not as clear as judges would like.

First I assume, without needing to decide, that the majority is correct in holding that subsection (n)(1) of Cal. Civ. Code § 990 exempts uses in videotapes, as well as in films, plays and other forms of expression, even though the statute

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[2]Construing subsection (n) to exempt Best's use of the Astaire film clips also has the commendable effect of avoiding the potential First Amendment concern which would be created were Best held liable for using the film clips in an original videotape. Under California's principles of statutory construction, a construction which best avoids conflict with constitutional limitations is favored. *See J. A. Savage v. Pacific Gas & Elec. Co.*, 26 Cal. Rptr. 2d 305, 312 (Cal. Ct. App. 1993).

[3]Having concluded that Best's use of the Astaire film clips is exempt from liability under § 990, we need not reach the other issues presented by the parties' arguments, *viz.*, whether Best's use is covered by § 990(a), whether Mrs. Astaire's § 990 claim is preempted by the federal Copyright Act, and whether holding Best liable violates the First Amendment.

does not expressly refer to videotapes. In my view, the majority goes wrong when it holds that this use of the Astaire footage is exempt as an "advertisement or commercial announcement" of an exempt use.

The majority reasons that the language of subsection (n)(4) exempts all advertisements or commercial announcements for plays, films, videotapes, etc. This is incorrect. That subsection exempts only advertisements or commercial announcements for uses permitted in the earlier paragraphs. The relevant exemption in this case must be the exemption in paragraph (1) for use of an image or likeness in a videotape, film, play or other expressive form. This footage of Astaire, however, is not used in the dance instruction video. The clips are used to promote the accompanying videotape of dance instruction that does not use Astaire's image. Had the clips been used in an announcement physically separated from the rest of the video, the use of the clips would clearly not have been exempt. The fact that Best chose to attach the clips to the dance instruction video in the form of a prefatory announcement does not change its essential nature: a commercial announcement of something unrelated to any exempted use of a photograph or likeness. The clips are therefore not advertising or announcing a "use permitted by paragraph (1)," and thus they are not exempt under paragraph (4).

Under the majority's reasoning one could with impunity hawk a videotape on fashion for the next century by introducing it with footage of Jacqueline Kennedy. The statute

was intended to prevent such exploitation, not immunize it. I therefore must respectfully dissent.

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ORDER AND
AMENDED OPINION

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for the Central District of California
David V. Kenyon, District Judge, Presiding

Argued and Submitted
March 3, 1997 — Pasadena, California

Filed June 20, 1997
Amended February 19, 1998

Before: Mary M. Schroeder, Charles E. Wiggins and
Edward Leavy, Circuit Judges.

Opinion by Judge Wiggins; Dissent by Judge Schroeder

SUMMARY

Intellectual Property/Entertainment

The court of appeals reversed a judgment of the district court. The court held that under California law, a videotape producer may use clips from a deceased entertainer's movies for internal advertising of instructional videotapes under a state statutory exemption for such use in "film."

In 1965, Fred Astaire granted the Ronby Corporation an exclusive license to use his name and likeness in connection with the operation of dance studios, schools, and related activities. Appellee Best Film and Video Corporation agreed with Ronby to produce instructional videotapes using the Astaire name and licenses.

The videos were known as the "Fred Astaire Dance Series." The packaging emphasized their connection with Astaire. Each video contained short film clips from two of Astaire's films in which he is shown dancing.

When Astaire died in 1987, his wife Robyn succeeded to all rights in his name, voice, likeness, and persona under California Civil Code § 990. Section 990(a) provides a cause of action for the owner of such rights who is injured as a result of their unauthorized use "on or in products, merchandise, or goods," or for the purpose of "advertising, or selling, or soliciting" their purchase. Exempted by subsection (n)(1) are use in a film or television program, and by subsection (n)(4), use in an advertisement or commercial announcement for such permitted uses. Best did not have Robyn's authorization to use the Astaire film clips in its videotapes.

Robyn sued Best, alleging that its videotapes violated her rights under § 990. The district court determined that Best's use of the film clips was covered by § 990(a); that is was not a use for "advertising, selling or soliciting"; that it was not exempt under subsection (n); that Robyn's claim was not

preempted by federal copyright law; and that Best's use was not protected by the First Amendment. Both sides appealed.

[1] Although subsection (n)(1) exempts films and television programs, it does not mention videotapes. Language of a statute should not be given a literal meaning if doing so would result in absurd consequences the legislature did not intend.

[2] Interpreting subsection (n)(1) to exempt a film or television program but not a videotape would create an absurd result: a motion picture is exempt when it is shown in a theater or on cable television, but not when someone rents it at a video store and plays it on his VCR. A narrow construction of "film" and "television program" would be inconsistent with subsection (i), which defines "photograph" broadly to include videotape or live television transmission. It would be anomalous if the definition of photograph included a videotape recording of a film, but "film" did not. The term "film" in subsection (n)(1) encompassed Best's videotapes.

[3] Uses listed in subsection (n)(1) are not exempt if they are advertisements or commercial announcements not exempt under subsection (n)(4). Best's use of the Astaire film clips was exempt in either case.

[4] If it was not an advertisement or a commercial announcement, Best's use was exempt pursuant to subsection (n)(1). If the film clips were advertisements, they were advertisements for the videotapes themselves rather than some other product. Because Best's videotapes were among the uses exempted by subsection (n)(1), subsection (n)(4) provided that even if Best's use of the film clips was an advertisement or commercial announcement, such use was exempt from liability.

[5] Assuming that the clips were only an advertisement, it is not reasonable to conclude that the video itself did not

contain the film clips. The Astaire film clips were clearly part of the video. Even if the rest of the video were considered separately, there was use of Astaire's persona within it, since his name and stills from his movies were prominently displayed.

[6] The court of appeals' holding was narrow, and driven by the unusual facts that Astaire had licensed the use of his name to the dance studios, and that the film clips of Astaire dancing, which were in the public domain, were used in a how-to-dance video.

[7] The evolution of subsection (n) demonstrated that the interpretation of the statute the court of appeals concluded was required by the plain language was consistent with the Legislature's intent.

[8] Whether the use is intended to increase the marketability of a product cannot be the test for whether it is exempt from § 990 liability.

[9] Best's use of the Astaire film clips was exempt.

Judge Schroeder dissented, writing that California Civil Code § 990(n)(4) exempts only advertisements or commercial announcements for uses permitted in the preceding paragraphs.

COUNSEL

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Dean T. Barnhard, Barnes & Thornberg, Indianapolis, Indiana, Shirley M. Hufstedler, Morrison & Foerster, Los Angeles, California, for amici Wayne Enterprises Ltd., Wayne Productions, Inc., the Screen Actors Guild, Inc., et al.

ORDER

The slip opinion filed on June 20, 1997, is amended as follows.

1. Add at slip opinion page 7178, end of the first full paragraph, the following footnote:

> In her petition for rehearing, Mrs. Astaire argues that we have improperly decided the case on a ground neither raised below nor briefed in this court. This argument is plainly incorrect. The record below discloses that Best raised § 990(n) as a defense, Best's arguments were quickly and summarily rejected by the district court. *See* Appellant's Excerpt of Record at 5, 65, 93. Moreover, Best's opening brief to this court prominently featured the § 990(n) argument. *See* Appellant's Opening Brief at 7-11.
>
> We admit that our interpretation of § 990(n) was not offered by any of the parties. But that does not make it improper or any less correct. This court can interpret a statute de novo on appeal; it is not required merely to choose between the opposing interpretations offered by the parties.

2. On slip op. p. 7180, change "that limitation is also limited" to "that limitation is itself limited."

3. On slip op. p. 7182-83, remove the last paragraph on page 7182 and replace it with the following:

> Under Mrs. Astaire's proposed interpretation, § 990(n)(1) "exempts certain non-advertising uses from liability, and § 990(n)(4) exempts advertisements *for those non-advertising uses.*" Petition for Rehearing at 9. This interpretation is contrary to the language of § 990(n)(1), which clearly includes as exempt certain advertising uses — those exempt under § 990(n)(4). Mrs. Astaire tries to convince us to ignore the final words of § 990(n)(1). We cannot.
>
> Mrs. Astaire, herself notes that "if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed." *Lungren v. Deukmejian,* 755 P.2d 299, 304 (Cal. 1988). However, we cannot consider her interpretation, which ignores the language in § 990(n)(1), to be the more reasonable. She wishes us to hold that the clip's of Astaire dancing at the start of the video are not connected to the content of the learn-to-dance video and, therefore, are merely an advertisement for the video. She contends then that the advertisement is a distinct entity analytically, separate from the video. Thus, under her interpretation, there would be no "use" of Astaire's persona in the video itself that would fall under § 990(n)(1). Even assuming for the sake of argument that the clips are only an advertisement, we do not think it is reasonable to conclude that the video itself did not contain the film clips. The Astaire film clips are clearly part of the video. In addition, even if we were to consider the rest of the video separately, there was use of Astaire's persona within it, since his name and stills from his movies were prominently displayed.
>
> Mrs. Astaire raises the spectre of a "draconian" destruction of "legitimate publicity rights" under our interpretation of § 990, suggesting that a celebrity's name and

photograph could now be used freely to advertise any film, however unconnected to the celebrity. That is not so. Our holding in this case is narrow and driven by the unusual facts that Astaire had licensed the use of his name to the dance studios and that the film clips of Astaire dancing, clips which were in the public domain, were used in a how-to-dance video. The absurdity Mrs. Astaire claims will arise from our interpretation would in reality arise from hers, She is asking courts to make a content-based decision every time a filmmaker or author uses the name or image of a celebrity, "Is this use of his name related to the content of this book, or is it merely advertising used to call attention to the book?" Not only would this create great uncertainty in the law, but there is no suggestion within § 990 or its legislative history that the California state legislature intended such an inquiry.

SO ORDERED.

OPINION

WIGGINS, Circuit Judge:

Best Film & Video Corporation ("Best") is a New York corporation which manufactures, markets, and distributes. prerecorded videotapes. Robyn Astaire ("Mrs. Astaire") is the widow of the legendary performer Fred Astaire. Mrs. Astaire sued Best in federal district court, alleging that Best's use of her late husband's image in a series of dance instructional videotapes violated her statutory right to control such use under California law. Although the district court concluded that Astaire's image was not used for the purpose of advertising, selling, or soliciting the purchase of the videotapes, the district court granted summary judgment in favor of Mrs. Astaire. Both sides appeal. Concluding that Best's use of Astaire's image is exempt from liability pursuant to Cal. Civ. Code § 990(n), we reverse.

BACKGROUND

In 1965, Fred Astaire granted the Ronby Corporation ("Ronby") an exclusive license to use his name in connection with the operation of dance studios, schools, and related activities. Astaire also granted Ronby the right to use certain pictures, photographs, and other likenesses of himself as had been used under a previous agreement, as well as any new photographs and likenesses that he approved in writing.

Twenty-four years later, Best entered into an agreement with Ronby to produce a series of dance instructional videotapes using the Fred Astaire Dance Studios name and licenses. Since October 1989, Best has been manufacturing and distributing a series of five videotapes known as the "Fred Astaire Dance Series." The videotapes are each about thirty minutes long and provide instruction in a type of dancing, with titles such as "Swing," "Latin Dancing," and "Ballroom."

Each videotape is packaged in a box prominently labelled "Fred Astaire Franchised Dance Studios" on every side. The back of the box features the following quote attributed to Astaire. "Some people feel that good dancers are born. All the good dancers I've known have been taught or trained." The back also contains a description of the videotape that refers to Astaire as "the master" and "the world's greatest dancer."

The videotape itself begins with an introductory segment. After Best's logo is shown, the title "Fred Astaire Dance Studios Presents How to Dance Series" appears on the screen. Then, before any other footage or narration, the videotape contains about ninety seconds of footage from two of Astaire's films — *Second Chorus and Royal Wedding* — in which Astaire is shown dancing alone and with a partner ("the Astaire film clips"). Some still photographs of Astaire follow, and then a narrator appears on a stage adorned with

more Astaire photographs. The narrator then introduces the series and the instructional portion of the video.

Fred Astaire died in 1987. He was survived by his wife, Robyn, who has succeeded to all rights in his name, voice, signature, photograph, likeness and persona under Cal. Civ. Code § 990.[1] In 1989, Mrs. Astaire sued Best and others in federal district court, alleging *inter alia* that the Best videotapes violated her § 990 rights by using Astaire's image as it appears in the clips from *Second Chorus and Royal Wedding* without her permission. Although Mrs. Astaire originally contended otherwise, the parties no longer dispute that Best's use of Astaire's name and the still photographs are

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[1]Section 990 provides, in relevant part:

(a) Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for the purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof. . . .

(h) As used in this section, "deceased personality" means any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death. . . .

(i) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any video tape or live television transmission, of any person, such that the deceased personality is readily identifiable. . . .

(n) This section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, in. any of the following instances:

(1) A play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4).

(2) Material that is or political or newsworthy value.

(3) Single and original works of fine art.

(4) An advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3).

Cal. Civ. Code § 990 (West Supp. 1997).

authorized under Astaire's agreement with Ronby. Thus, this case focuses entirely on whether § 990 provides Mrs. Astaire with a claim against Best's use of the Astaire film clips.

After several years of proceedings, the district court entered a judgment which made the following legal determinations: (1) Best's use of the Astaire film clips was covered by § 990(a)'s "on or in products, merchandise, or goods" language; (2) Best's use of the Astaire film clips was not a use for "advertising, selling, or soliciting" in violation of § 990(a); (3) Best's use of the Astaire film clips was not exempt under § 990(n); (4) Mrs. Astaire's § 990 claim was not preempted by the federal Copyright Act; and (5) Best's use of Astaire's likeness was not protected by the First Amendment. Both sides appeal. We have jurisdiction under 28 U.S.C. § 1291.

DISCUSSION

I. *Standard of Review*

We review the district court's decision on an issue of state law under the same de novo standard applied to decisions of federal law, *Mastro v. Witt,* 39 F.3d 238, 241 (9th Cir. 1994). For questions of California law, we must apply the law as we believe the California Supreme Court would apply it. *Intel Corp. v. Hartford Accident & Indem. Co.,* 952 F.2d 1551, 1556 (9th Cir. 1991). In the absence of a California Supreme Court decision, we must predict how the California Supreme Court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises and restatements as guidance. *Lewis v. Telephone Employees Credit Union,* 87 F.3d 1537, 1545 (9th Cir. 1996).

II. *Section 990*

Many of the parties' arguments focus on § 990. Best argues that the district court erred when it concluded that its use of the Astaire film clips violated the "on or in products, merchandise, or goods" prong of the statute. Best also contends that the district court erred when it concluded that its use of the Astaire film clips was not exempt under subsection (n). Mrs. Astaire argues that the district court erred when it concluded that Best's use of the Astaire film clips did not violate the "advertising, selling, or soliciting" prong of subsection (a). We first address Best's subsection (n) argument, because if Best's use is exempt from § 990 liability altogether, we need not reach the other issues presented by this case.[2]

We begin by reviewing California law on statutory, interpretation. The California Supreme Court recently stated that "[the] first task in construing a statute is to ascertain the intent of the legislature so as to effectuate the purpose of the law." *Quintano v. Mercury Cas. Co.*, 906 P.2d 1057,

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[2]In her petition for rehearing, Mrs. Astaire argues that we have improperly decided the case on a ground neither raised below nor briefed in this court. This argument is plainly incorrect. The record below discloses that Best raised § 990(n) as a defense; Best's arguments were quickly and summarily rejected by the district court. *See* Appellant's Excerpt of Record at 5, 65, 93. Moreover, Best's opening brief to this court prominently featured the § 990(n) argument. *See* Appellant's Opening Brief at 7-11.

We admit that our interpretation of § 990(n) was not offered by any of the parties. But that does not make it improper or any less correct. This court can interpret a statute de novo on appeal; it is not required merely to choose between the opposing interpretations offered by the parties.

1060. (Cal. 1995). This process of apprehending the legislature's intent sensibly starts with the statute's language:

> In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. . . . The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.

Dyna-Med, Inc. v. Fair Employment & Housing Comm'n., 743 P.2d 1323, 1326 (Cal. 1987).

With these principles in mind, we turn to the language of the statute. Section 990(n) provides:

> (n) This section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, in any of the following instances:
>
> (1) A play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4).
>
> (2) Material that is of political or newsworthy value.
>
> (3) Single and original works of fine art,
>
> (4) An advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3).

Cal. Civ. Code § 990(n).

Giving this language its ordinary and usual meaning, this provision tells us that the following uses are exempt from § 990 liability: use in a play, book, magazine, newspaper, music composition, film, radio or television program; use in material that's of political or newsworthy value, use in single

and original works of fine art; and use in an advertisement or commercial announcement for any of the aforementioned uses. However, subsection (n)(1) limits the exemption for use in a play, book, magazine, newspaper, musical composition, film, radio or television program: such uses are not exempt if they are advertisements or commercial announcements. However, that limitation is itself limited: such advertisements or commercial announcements may still be exempt under subsection (n)(4), the provision which exempts advertisements and commercial announcements for the uses described in subsections (n)(1), (n)(2), and (n)(3). Thus, to determine whether a use is exempt under subsection (n)(1) requires reference to subsection (n)(4), which in turn refers back to subsections (n)(1), (n)(2), and (n)(3).

Given this fairly convoluted statutory scheme, a few examples help us determine what these provisions mean:

Example 1. Suppose someone writes a magazine article about the history of television that uses a deceased personality's name without authorization. Neither the writer nor the magazine publisher could be sued under § 990: the writer's use of the deceased personality's name would be exempt from § 990 liability pursuant to subsection (n)(1).

Example 2. Suppose that an automobile manufacturer wanted to advertise its latest model in the same magazine with a splashy color layout that included the picture of a deceased personality. Although the use appears in a magazine, the use of the deceased personality's photograph would not be exempt under subsection (n)(1) because it appears in an advertisement. The use is not permitted in subsections (n)(1), (n)(2), or (n)(3), so it is not exempt under subsection (n)(4).

Example 3. Suppose that the magazine publisher from Example 1 wanted to advertise its magazine by referring to

various articles that had appeared within its pages, including the article about the history of cinema. If that advertisement used the deceased personality's name, that use would be exempt under subsection (n)(4), because the advertisement was for a magazine, a use permitted by subsection (n)(1).

[1] With these examples in mind, we turn to Best's use of the Astaire film clips, Best's use of the Astaire film clips appears on a pre-recorded videotape. Although subsection (n)(1) exempts films and television programs, it does not mention videotapes. Ordinarily, if the language of the statute is clear and unambiguous, there is no need to resort to the indicia of the intent of the legislature. *Lungren v. Deukmejian,* 755 P.2d 299, 303-04 (Cal. 1988). However, this "plain meaning" rule "does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose." *Id.* at 304. "It is a settled rule of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." *Younger v. Superior Court,* 577 P.2d 1014, 1021-22 (Cal. 1978). "The intent prevails over the letter, and the letter will, if possible, be so read so to conform to the spirit of the act." *Lungren,* 755 P.2d at 304.

[2] Interpreting subsection (n)(1) to exempt a film or television program but not a videotape creates an absurd result: a motion picture is exempt from § 990 liability when it is shown in a theater or on cable television but not when someone rents it at a video store and plays it on his VCR. Moreover, a narrow construction of "film" and "television program" would be inconsistent with § 990(i), which defines "photograph" broadly to include "any photographic reproduction, still or moving, of any video tape or live television transmission . . . such that the deceased personality is readily identifiable." It would be anomalous if the definition of photograph included a videotape recording of a

film but "film" did not. Consequently, we conclude that the California Supreme Court would not adhere to the literal language of subsection (n)(1); rather, we conclude that the term "film" in subsection (n)(1) encompasses Best's prerecorded videotapes.

[3] However, our inquiry is not yet complete. As Example 2 illustrates, a use is not automatically exempt because it is listed in the first part of subsection (n)(1). The uses listed in the first part of subsection (n)(1) are not exempt if they are "advertisement[s] or commercial announcement[s] not exempt under [subsection] (n)(4)." The parties dispute whether Best's use of the Astaire film clips is an advertisement or commercial announcement. We need not resolve this dispute, however, because Best's use of the Astaire film clips is exempt from liability in either case.

[4] If Best's use of the Astaire film clips is not an advertisement or commercial announcement, then the second part of subsection (n)(1) does not apply. Accordingly, Best's use is exempt from liability pursuant to subsection (n)(1). If, however, we assume for argument's sake that Best's use of the Astaire film clips is an advertisement or commercial announcement, Best's use is still exempt from liability. If the Astaire film clips are an advertisement, they are certainly an advertisement for the videotapes themselves rather than some other product. As Example 3 illustrates, subsection (n)(4) exempts advertisements and commercial announcements for uses permitted in subsections (n)(1), (n)(2) and (n)(3), Because Best's videotapes are among the uses exempted by the first part of subsection (n)(1), subsection (n)(4) provides that even if Best's use of the Astaire film clips is an advertisement or commercial announcement, such a use is exempt from liability.

Under Mrs. Astaire's proposed interpretation, § 990(n)(1) "exempts certain non-advertising uses from liability, and § 990(n)(4) exempts advertisements for those

non-advertising uses." Petition for Rehearing at 9. This interpretation is contrary to the language of § 990(n)(1), which clearly includes as exempt certain advertising uses — those exempt under § 990(n)(4). Mrs. Astaire tries to convince us to ignore the final words of § 990(n)(1). We cannot.

[5] Mrs. Astaire herself notes that "if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed." *Lungren v. Deukmejian,* 755 P.2d 299, 304 (Cal. 1988). However, we cannot consider her interpretation, which ignores the language in § 990(n)(1), to be the more reasonable. She wishes us to hold that the clips of Astaire dancing at the start of the video are not connected to the content of the learn-to-dance video and, therefore, are merely an advertisement for the video. She contends then that the advertisement is a distinct entity analytically, separate from the video. Thus, under her interpretation, there would be no "use" of Astaire's persona in the video itself that would fall under § 990(n)(1). Even assuming for the sake of argument that the clips are only an advertisement, we do not think it is reasonable to conclude that the video itself did not contain the film clips. The Astaire film clips are clearly part of the video. In addition, even if we were to consider the rest of the video separately, there was use of Astaire's persona within it, since his name and stills from his movies were prominently displayed.

[6] Mrs. Astaire raises the spectre of a "draconian" destruction of "legitimate publicity rights" under our interpretation of § 990, suggesting that a celebrity's name and photograph could now be used freely to advertise any film, however unconnected to the celebrity. That is not so. Our holding in this case is narrow and driven by the unusual facts that Astaire had licensed the use of his name to the dance studios and that the film clips of Astaire dancing, clips

which were in the public domain, were used in a how-to-dance video. The absurdity Mrs. Astaire claims will arise from our interpretation would in reality arise from hers. She is asking courts to make a content-based decision every time a filmmaker or author uses the name or image of a celebrity; "Is this use of his name related to the content of this book, or is it merely advertising used to call attention to the book?" Not only would this create great uncertainty in the law, but there is no suggestion within § 990 or its legislative history that the California state legislature intended such an inquiry.

In sum, we conclude that when subsection (n) is read in its entirety, the only interpretation of its plain language which is internally consistent and gives effect to each phrase and clause of the provisions leads to the conclusion that Best's use of the Astaire film clips is exempt. Rather than end the inquiry here, however, under California law we must determine whether the meaning of the plain language comports with the legislature's purpose.

Mrs. Astaire asserts that the legislative history of Senate Bill 613 ("SB 613"), the legislation which enacted § 990 in 1984, supports the district court's conclusion that subsection (n)(1) creates a limited exception for "legitimate historical, fictional, and biographical accounts of deceased celebrities." Mrs. Astaire asserts that because the Astaire film clips were included in Best's videotapes to make them more attractive and salable, the exemption of subsection (n)(1) does not apply.

To support her argument that the Legislature intended subsection (n)(1)'s exemption to be limited to legitimate historical, biographical, and fictional works, Mrs. Astaire principally relies on several letters written by the author of SB 613. No matter how illuminating we might find these letters, California law generally prevents us from "consider[ing] the motives or understandings of an individual

legislator even if he or she authored the statute." *Williams v. Garcetti,* 853 P.2d 507, 510 (Cal. 1993) (quoting *Delaney v. Superior Court,* 789 P.2d 734, 743 n.12 (Cal. 1990)). As a result, we may not consider the various letters written by the author of SB 613.

We may consider, however, "the history of the statute, committee reports, and staff bill reports . . . to determine the intent of the Legislature." *DeCastro West Chodorow & Burns, Inc. v. Superior Court,* 54 Cal. Rptr. 2d 792, 798 (Cal. Ct. App. 1996). We may also consider the evolution of a proposed statute after its original introduction in the California State Senate or Assembly, as such evolution may "offer considerable enlightenment as to legislative intent." *People v. Goodloe,* 44 Cal. Rptr. 2d 15, 19 (Cal. Ct. App. 1995).

As originally introduced, SB 613 did not contain § 990 at all, instead focusing on modifications to existing statutory provisions to create a right of publicity for the heirs and descendents of deceased personalities. After the bill was passed by the Senate, however, it was amended in the Assembly several times. On June 12, 1984, § 990(n) appeared for the first time in the amended legislation. It read:

> Nothing in this section shall be construed to derogate from any rights protected by constitutional guarantees of freedom of speech or freedom of the press, such as the night to use a deceased personality's name, voice, signature, photograph, or likeness in a play, book, magazine, newspaper, film, television program, or similar medium of expression, to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press.

S.B. 613, 1983-84 Reg. Sess. (Cal. 1984) (hereinafter "S.B. 613") (as amended June 12, 1984).

A staff report on this version of SB 613 criticized this language for being superfluous: "[i]rrespective of this stated intent, a defendant who has used a person's name, voice, etc. without authorization may assert a First Amendment privilege." Staff of Assembly Comm. on Judiciary, 1983-84 Reg. Sess., *Report on S.B. 613 (Campbell) As Amended 6/12/84* at 6 (Cal. 1984). Shortly thereafter, § 990(n) was amended to its current version, which does not contain the language explicitly limiting the scope of its exemption to constitutionally protected uses. *See* S.B. 613 (as amended July 3, 1984).

[7] The Legislature's removal of the language "to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press" from SB 613 is a telling clue as to the Legislature's intent. By deleting this language, the Legislature demonstrated an intent to adopt a broader exemption that was not limited to constitutionally protected uses. In other words, the evolution of subsection (n) demonstrates that the interpretation of the statute we conclude is required by the plain language is consistent with the Legislature's intent.

The same staff report on SB 613 describes the bill generally as follows:

> [T]he bill is intended to address circumstances in which (a) commercial gain is had through the exploitation of the name, voice, signature, photograph, or likeness of a celebrity or public figure in the marketing of goods or services or (b) a celebrity or public figure is subjected to abuse or ridicule in the form of a marketed product. Such goods or services typically involved the use of a *deceased* celebrity's name or likeness, e.g., on posters, T-shirts, porcelain plate's, and other collectibles; in toys, gadgets, and other merchandise; in look-alike services.

Staff of Assembly Comm. on Judiciary, *supra,* at 3-4. Several other legislative staff reports describe the legislation

similarly. *See, e.g.,* Assembly Office of Research, 1983-84 Reg. Sess., *Report on S.B. 613 (Campbell) As Amended 8/9/84* at 3 (Cal. 1984).

To the extent these reports reflect the Legislature's intent when it enacted § 990, our conclusion that Best's use of the Astaire film clips is exempt from liability is not inconsistent with this expressed intent. Best's use in no possible way subjects Fred Astaire to abuse or ridicule. Best's use is also nothing like the exploitative marketing uses described in these legislative staff reports.

[8] We recognize, however, that Best placed these film clips in its videotapes for a reason: to make the videotapes more salable. Nevertheless, neither the statute nor the legislative history provides any support for treating Best's use of the Astaire film clips any differently from the use of the same clips in a documentary about dance in film, a use that Mrs. Astaire concedes would be exempt from liability. In short, whether the use is included to increase the marketability of a product cannot be the test of whether it is exempt from § 990 liability.

[9] Having considered what limited guidance the legislative history of SB 613 gives us regarding the meaning of subsection (n), we conclude that the legislative history does not support Mrs. Astaire's contentions that the exception for use in a "play, book, magazine, newspaper, musical composition, film, radio or television program" is limited to "legitimate historical, fictional, and biographical accounts of deceased celebrities." We conclude that the language of subsection (n) should be given its ordinary and usual meaning, and that Best's use of the Astaire film clips is accordingly exempt.[3]

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[3]Construing subsection (n) to exempt Best's use of the Astaire film clips also has the commendable effect of avoiding the potential First Amendment concern which would be created were Best held liable for

CONCLUSION

We conclude that Best's use of the late Fred Astaire's likeness/photograph in its "How to Dance" videotapes is exempt from § 990 liability pursuant to subsection (n).[4] Accordingly, the judgment of the district court is reversed and we remand with instructions to enter judgment in favor of Best.

REVERSED and REMANDED.

SCHROEDER, Circuit Judge, Dissenting:

I dissent from the majority's conclusion that this use of Fred Astaire's legendary film performances, to preface a videotape having nothing to do with Fred Astaire, is exempt under the California statute. I dissent with respect, however, because the statute is not as clear as judges would like.

First I assume, without needing to decide, that the majority is correct in holding that subsection (n)(1) of Cal. Civ. Code § 990 exempts uses in videotapes, as well as in films, plays and other forms of expression, even though the statute does not expressly refer to videotapes. In my view, the majority goes wrong when it holds that this use of the Astaire footage is exempt as an "advertisement or commercial announcement" of an exempt use.

The majority reasons that the language of subsection (n)(4) exempts all advertisements or commercial an-

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using the film clips in an original videotape. Under California's principles of statutory construction, a construction which best avoids conflict with constitutional limitations is favored. *See J.A. Savage v. Pacific Gas & Elec. Co.*, 26 Cal. Rptr. 2d 305, 312 (Cal. Ct. App. 1993).

[4]Having concluded that Best's use of the Astaire film clips is exempt from liability under § 990, we need not reach the other issues presented by the parties' arguments, *viz.*, whether Best's use is covered by § 990(a), whether Mrs. Astaire's § 990 claim is preempted by the federal Copyright Act, and whether holding Best liable violates the First Amendment.

nouncements for plays, films, videotapes, etc. This is incorrect. That subsection exempts only advertisements or commercial announcements for uses permitted in the earlier paragraphs. The relevant exemption in this case must be the exemption in paragraph (1) for use of an image or likeness in a videotape, film, play or other expressive form. This footage of Astaire, however, is not used in the dance instruction video. The clips are used to promote the accompanying videotape of dance instruction that does not use Astaire's image. Had the clips been used in an announcement physically separated from the rest of the video, the use of the clips would clearly not have been exempt. The fact that Best chose to attach the clips to the dance instruction video in the form of a prefatory announcement does not change its essential nature: a commercial announcement of something unrelated to any exempted use of a photograph or likeness. The clips are therefore not advertising or announcing a "use permitted by paragraph (1)," and thus they are not exempt under paragraph (4).

Under the majority's reasoning one could with impunity hawk a videotape on fashion for the next century by introducing it with footage of Jacqueline Kennedy. The statute was intended to prevent such exploitation, not immunize it. I therefore must respectfully dissent.

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APPENDIX C

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBYN ASTAIRE,

Plaintiff-Appellee.

vs.

BEST FILM & VIDEO CORP.

Defendant-Appellant.

No. 95-56632
D.C. No. CV-90-00261-KN-A

ROBYN ASTAIRE,

Plaintiff-Appellee.

vs.

BEST FILM & VIDEO CORP.

Defendant-Appellant.

No. 95-56633
D.C. No. CV-90-00261-KN-A

ORDER

Before: SCHROEDER, WIGGINS, and LEAVY, Circuit Judges.

Plaintiff-appellee's motion to stay issuance of the mandate and to certify question to the California Supreme Court and motion to file petition for rehearing are denied.

Defendant-appellant's motion for leave to file late responses to Astaire's motion for leave to file petition for rehearing and motion to stay issuance of the mandate is denied.

So ordered.

APPENDIX D

APPENDIX D

CIVIL CODE SECTION 990

990. (a) Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by the injured party or parties, as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing these profits, the injured party or parties shall be required to present proof only of the gross revenue attributable to the use and the person who violated the section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties.

The prevailing party or parties in any action under this section shall also be entitled to attorneys' fees and costs.

(b) The rights recognized under this section are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents, whether the transfer occurs before the death of the deceased personality, by the deceased personality or his or her transferees, or, after the death of the deceased personality, by the person or persons in whom the rights vest under this section or the transferees of that person or persons.

(c) The consent required by this section shall be exercisable by the person or persons to whom the right of consent (or portion thereof) has been transferred in accordance with subdivision (b), or if no such transfer has occurred, then by the person or persons to whom the right of consent (or portion thereof) has passed in accordance with subdivision (d).

(d) Subject to subdivisions (b) and (c), after the death of any person, the rights under this section shall belong to the following person or persons and may be exercised, on behalf of and for the benefit of all of those persons, by those persons who, in the aggregate, are entitled to more than a one-half interest in the rights:

(1) The entire interest in those rights belong to the surviving spouse of the deceased personality unless there are any surviving children or grandchildren of the deceased personality, in which case one-half of the entire interest in those rights belong to the surviving spouse.

(2) The entire interest in those rights belong to the surviving children of the deceased personality and to the surviving children of any dead child of the deceased personality unless the deceased personality has a surviving spouse, in which case the ownership of a one-half interest in rights is divided among the surviving children and grandchildren.

(3) If there is no surviving spouse, and no surviving children or grandchildren, then the entire interest in those rights belong to the surviving parent or parents of the deceased personality.

(4) The rights of the deceased personality's children and grandchildren are in all cases divided among them and exercisable in the manner provided in Section 240 of the Probate Code according to the number of the deceased personality's children represented; the share of the

children of a dead child of a deceased personality can be exercised only by the action of a majority of them.

(e) If any deceased personality does not transfer his or her rights under this section by contract, or by means of a trust or testamentary document, and there are no surviving persons as described in subdivision (d), then the rights set forth in subdivision (a) shall terminate.

(f)(1) A successor-in-interest to the rights of a deceased personality under this section or a licensee thereof may not recover damages for a use prohibited by this section that occurs before the successor-in-interest or licensee registers a claim of the rights under paragraph 2.

(2) Any person claiming to be a successor-in-interest to the rights of a deceased personality under this section or a licensee thereof may register that claim with the Secretary of State on a form prescribed by the Secretary of State and upon payment of a fee of ten dollars ($10). The form shall be verified and shall include the name and date of death of the deceased personality, the name and address of the claimant, the basis of the claim, and the rights claimed.

(3) Upon receipt and after filing of any document under this section, the Secretary of State may microfilm or reproduce by other techniques any of the filings or documents and destroy the original filing or document. The microfilm or other reproduction of any document under the provision of this section shall be admissible in any court of law. The microfilm or other reproduction of any document may be destroyed by the Secretary of State 50 years after the death of the personality named therein.

(4) Claims registered under this subdivision shall be public records.

(g) No action shall be brought under this section by reason of any use of a deceased personality's name, voice,

signature, photograph, or likeness occurring after the expiration of 50 years from the death of the deceased personality.

(h) As used in this section, "deceased personality" means any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods or service.

A "deceased personality" shall include, without limitation, any such natural person who has died within 50 years prior to January 1, 1985.

(i) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any video tape or live television transmission, of any person, such that the deceased personality is readily identifiable. A deceased personality shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine who the person depicted in the photograph is.

(j) For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).

(k) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing the use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the deceased personality's name, voice, signature, photograph, or likeness

was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

(l) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that the owners or employees had knowledge of the unauthorized use of the deceased personality's name, voice, signature, photograph, or likeness as prohibited by this section.

(m) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

(n) This section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, in any of the following instances:

(1) A play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4).

(2) Material that is of political or newsworthy value.

(3) Single and original works of fine art.

(4) An advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3).

APPENDIX E

APPENDIX E

Amendments to the California Rules of Court
and Standards of Judicial Administration

Adopted by the Judicial Council
Effective January 1, 1998, and July 1, 1998

California Rules of Court

Rule 29.5. Questions of state law certified by federal appellate courts and other courts

(a) [Requirements for certified questions] The California Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, provided that:

(1) the certifying court requests the answer;

(2) the questions may be determinative of a cause pending in the certifying court; and

(3) the decisions of the California appellate courts provide no controlling precedent concerning the certified question.

(b) [Contents of certification request] Only a court specified in subdivision (a) may certify a question. The request shall be by an order that sets forth:

(1) the caption of the case, including names and addresses of counsel and of parties appearing per se, and a designation of the party to be deemed the petitioner on the certified question if the request to answer is granted;

(2) the questions of law to be answered;

(3) a statement (by stipulation of the parties subject to approval by the certifying court, or by the court itself) of all facts relevant to the certified question, and showing

fully the nature of the controversy and the circumstances in which the question arose;

(4) statements (i) demonstrating that the question certified is contested and that there is no controlling precedent in the case law of the California appellate courts; (ii) explaining how an authoritative answer to the certified question may be determinative of a cause pending in the certifying court; and (iii) indicating that the answer provided by the California Supreme Court will be followed by the certifying court; and

(5) such additional information as the certifying court may deem relevant and useful.

(c) [Briefs and other materials] The certifying court shall furnish legible copies of all relevant briefs to the California Supreme Court with the request for an answer to the certified question. The California Supreme Court may request that the certifying court furnish additional material, such as exhibits or all or a portion of the record that, in the opinion of the court, may be useful in answering the certified question.

(d) [Request procedure] The judge or justice presiding at the certification hearing (if any) or the presiding judge or justice of the court or panel certifying the question shall sign the request for an answer to the certified question, and the clerk of the certifying court shall forward it under its official seal to the California Supreme Court.

(e) [Factors that may be considered] The California Supreme Court shall have discretion to accept or deny the request for an answer to the certified question of law. In exercising its discretion the court may consider:

(1) factors that it ordinarily considers in deciding whether to grant review of a decision of a California Court of Appeal or to issue an alternative writ or other order in an original matter;

(2) comity, and whether answering the question will facilitate the certifying court's functioning or help terminate existing litigation;

(3) the extent to which an answer would turn on questions of fact; and

(4) any other factors the court may deem appropriate.

(f) [Clarification of question] At any time, the California Supreme Court may restate the certified question or may ask the certifying court to restate or clarify the certified question.

(g) [Order denying or accepting request] The California Supreme Court shall issue an order accepting or denying the request for an answer to the certified question. If the court accepts the request, it shall announce that determination in the manner that it announces the acceptance of cases for review, and thereafter.

(1) the California Rules of Court for briefing, argument, and conduct of appeals shall govern further proceedings on any certified question unless the court or the Judicial Council otherwise provides;

(2) fees and costs shall be the same as in appeals docketed before the California Supreme Court and, in civil matters, shall be equally divided between or among the parties unless the certifying court in its request for an answer to the certified question provides for a different allocation, or the California Supreme Court provides otherwise; and

(3) the California Supreme Court may in its discretion assign a certified question such priority on its docket as considerations of fairness, exigency, and comity may require.

(h) [Notice to California Attorney General] If the certified question concerns the proper interpretation of a California statute, in litigation in which the State of California or an officer, agency, or employee of the state is not a party, the clerk of the California Supreme Court shall notify the California Attorney General and the California Supreme Court may permit him or her to file briefs on the issue.

(i) [Transmission of opinion] The clerk shall forward the California Supreme Court's written opinion stating the law governing the certified question to the certifying court, under the seal of the Supreme Court, and also shall forward copies of the opinion to counsel of record.

(j) [Publication and precedential effect] The California Supreme Court's answer to a certified question shall have the same authoritative and precedential force as any other decision of the court, and shall be published in the Official Reports.

(k) [Procedural rules] The California Supreme Court or the Judicial Council may adopt procedures governing practice under this rule.

Rule 29.5 adopted effective January 1, 1998.